

## COMMENT

# A Leap Forward: Why States Should Ratify the Uniform Computer Information Transactions Act

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## I. INTRODUCTION

As a new century dawns, the American economy continues to evolve. Long gone are the days when the United States dominated the world economy by manufacturing goods. Today, our economy depends much more on services and information.<sup>1</sup> As the dominant players in our economy shift, the law needs to follow suit and deal with new issues. One recent piece of legislation attempts to bring the law in line with the developing information industry.

The Uniform Computer Information Transactions Act (UCITA or Act) has been drafted to address questions regarding contracts covering computer information. Patterned after the Uniform Commercial Code (UCC or Code), the UCITA actually began as a new article to the UCC.<sup>2</sup> However, the drafters realized that the specifics of an information product could not match the legal specifications of the sale of a good from Article 2. Accordingly, the drafters renamed the statute the UCITA to denote the Act's narrow focus to computer information. Originally known as proposed Article 2B, the drafters revised the Act, although much of the terminology remains the same.

The UCITA is not yet law. The National Conference of Commissioners on Uniform State Laws (NCCUSL) drafted the Act. NCCUSL also drafted the UCC.<sup>3</sup> The 107-year-old organization attempts to bring uniformity to state laws by drafting legislation and then lobbying each state to pass the law.<sup>4</sup> NCCUSL designs its commercial law statutes to "codify established commercial practice and its reflection in the decided cases."<sup>5</sup> NCCUSL completed its final draft of the UCITA in the summer of 1999 and then voted on the enactment on July 29, 1999. The Act passed by

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1. See, e.g., Micalyn S. Harris, *Is UCITA Worthy of Active Support?* (visited Jan. 21, 2000) <<http://www.2bguide.com/docs/mh1099.html>>. Harris cites a U.S. Department of Commerce report that states that the United States's packaged software market for 1996 was \$50.4 billion.

2. See Fred H. Miller & Carlyle C. Ring, *Article 2B's New Uniform: A Free-standing Computer Information Transactions Act* (visited Jan. 21, 2000) <<http://www.2bguide.com/docs/muaa.html>>.

3. See JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 1, at 2 (3d ed. 1988).

4. See Miller & Ring, *supra* note 2.

5. *Id.*

a vote of forty-three to six.<sup>6</sup> As of the publication date, only one state has voted on the UCITA. Virginia adopted UCITA as law and the governor signed the bill on March 14, 2000.<sup>7</sup> The Act has been introduced to the legislatures in Delaware, the District of Columbia, Hawaii, Illinois, Iowa, Maryland, and Oklahoma.<sup>8</sup>

Despite the fact that a large majority of NCCUSL members voted to approve the UCITA, the Act is not without critics. Several organizations have stepped forward to voice their opposition to the Act and asked state legislatures to not approve the law.<sup>9</sup> Parties opposing passage of the UCITA include consumer groups,<sup>10</sup> library associations,<sup>11</sup> writers' groups,<sup>12</sup> academics,<sup>13</sup> state attorneys general,<sup>14</sup> and the Federal Trade Commission (FTC).<sup>15</sup> Although these organizations oppose the Act for various reasons, one common thread that emerges is that the UCITA favors software producers to the detriment of software users.<sup>16</sup>

This Comment discusses the support and opposition to the UCITA. In Part II, this Comment examines the Act. This Comment compares the UCITA to Article 2 of the UCC. The UCITA and Article 2 share several similarities, as the Act began as an addition to Article 2. However, the UCITA also contains several innovations that distance it from the sale of goods provisions of Article 2. As a number of commentators have lined up

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6. See Carlyle C. Ring, Jr. & Raymond T. Nimmer, *Series of Papers on UCITA Issues* (visited Jan. 21, 2000) <<http://www.nccusl.org/pressrel/UCITAQA.HTM>>.

7. See *UCITA Online* (visited Apr. 1, 2000) <<http://www.uitaonline.com/whataup.html>>.

8. See *id.*

9. See Dorie Toft, *Opponents Blast Proposed U.S. Software Law* (visited Jan. 21, 2000) <<http://www.cnn.com/TECH/computing/9907/12/ucita.idg/>>.

10. See *id.*

11. See Letter from Duane E. Webster, Executive Director, Association of Research Libraries, to Gene N. Lebrun, President, NCCUSL (July 12, 1999), available at (visited Jan. 21, 2000) <<http://www.arl.org/info/letter/lebrun7.12.html>> [hereinafter Library Letter].

12. See National Writers Union, *UCC 2B and UCITA Threatens Writers* (visited Jan. 21, 2000) <<http://www.nwu.org/pic/uchome.htm>>.

13. See Letter from Mark A. Lemley et al., Professor, University of Texas School of Law, to Carlyle C. Ring et al., Chairman, NCCUSL Article 2B Drafting Committee (Nov. 17, 1998), available at (visited Jan. 21, 2000) <<http://www.2Bguide.com/docs/1198ml.html>> [hereinafter Professor Letter].

14. See Letter from W.A. Drew Edmondson et al., Attorney General, Oklahoma, to Gene Lebrun, President, NCCUSL (July 23, 1999), available at (visited Jan. 21, 2000) <<http://www.arl.org/info/frn/copy/agoppltr.html>> [hereinafter Attorney General Letter].

15. See Letter from Joan Z. Bernstein et al., Director, Bureau of Consumer Protection, FTC, to John L. McClaugherty, Chair of Executive Committee, NCCUSL (July 9, 1999), available at (visited Jan. 21, 2000) <<http://www.ftc.gov/be/v990010.htm>> [hereinafter FTC Letter].

16. See Toft, *supra* note 9.

on both sides of the Act, Part III of this Comment views the support for and opposition to the UCITA. After reviewing the commentary, this Comment concludes that state legislatures should enact the UCITA.

## II. WHAT IS THE UCITA AND HOW DOES IT FUNCTION?

The UCITA began as Article 2B of the UCC. The UCC originated as a project to create uniformity in commercial law. The Code has emphasized freedom of contract and adherence to business standards.<sup>17</sup> These factors differentiate the UCC from regulatory statutes that place more restrictions on parties. Despite several revisions of the major Code sections, the UCC has been a remarkable success. Two prominent commentators describe the UCC as "the most spectacular success story in the history of American law."<sup>18</sup> With the desire to enact a statute true to the commerce-friendly UCC, NCCUSL commenced drafting Article 2B.

NCCUSL decided that a new law for information transactions was needed because courts sought guidance to resolve disputes in software transactions by applying rules from Article 2.<sup>19</sup> Article 2 could not provide the answers for these questions, as the sale of goods involved a tangible item (e.g., a toaster), while software transactions involved a tangible item (e.g., a CD) *and* the information contained within the item.<sup>20</sup>

NCCUSL and the American Law Institute began drafting UCC Article 2B several years ago.<sup>21</sup> However, after years of attempts to integrate information transactions with the sale of goods, the drafters realized that the proposed Article 2B could not be integrated into the UCC Article 2 and 2A framework.<sup>22</sup> Despite the conclusion that information transactions could not mesh into the UCC, the drafters recognized the importance of creating the information act.<sup>23</sup> The drafters decided that the act would embody relevant UCC principles, including freedom of contract and use of custom and practice to give the statute flexibility, while also taking note of the specifics of the information industry.<sup>24</sup> As a result, NCCUSL renamed Article 2B as the Uniform Computer Information Transactions Act.

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17. See Fred H. Miller, *UCC Article 2B: Good Law, or Flawed Law?*, 52 CONSUMER FIN. L.Q. RPT. 374, 374 (1998).

18. WHITE & SUMMERS, *supra* note 3, § 1, at 5.

19. See Miller & Ring, *supra* note 2.

20. See *id.*

21. See *id.*

22. See *id.*

23. See *id.*

24. See *id.*

### A. Overview of the Act

The UCITA is divided into nine parts: (1) General Provisions, (2) Formation and Terms, (3) Construction, (4) Warranties, (5) Transfer of Interests and Rights, (6) Performance, (7) Breach of Contract, (8) Remedies, and (9) Miscellaneous Provisions. Each part is divided into subparts and sections. The format of the UCITA matches that of individual articles from the UCC, especially Article 2. The drafters designed the Act to work as a "commercial code, not a regulatory code. It provides a series of default rules that operate unless the parties agree otherwise."<sup>25</sup> The default rules allow the parties to negotiate among themselves to develop a deal most favorable to both.

NCCUSL lists four purposes for the UCITA, to: (1) "support and facilitate the realization of the full potential of computer information transactions in cyberspace;" (2) "clarify the law governing computer information transactions;" (3) "enable expanding commercial practice in computer information transactions by commercial usage and agreement of the parties;" and (4) "make the law uniform among the various jurisdictions."<sup>26</sup>

To achieve these purposes, NCCUSL has identified five themes that frame many of the terms of the UCITA. First, "the paradigm transaction is a license of computer information, rather than a sale of goods."<sup>27</sup> Second, "innovation and competitiveness have come from small entrepreneurial companies as well as larger companies."<sup>28</sup> Third, "computer information transactions engage free speech issues."<sup>29</sup> Fourth, "a commercial law statute should support contractual freedom and interpretation of agreements in light of the practical commercial context."<sup>30</sup> Fifth, "a substantive framework for Internet contracting is needed to facilitate commerce in computer information."<sup>31</sup>

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25. Lorin Brennan & Glenn A. Barber, *Why Software Professionals Should Support the Uniform Computer Information Transactions Act (And What Will Happen if They Don't)*, SOFTWARE QUALITY PROFESSIONAL, forthcoming, available at (visited Mar. 19, 2000) <<http://www.2bguide.com/legart.html>>.

26. NCCUSL, *Prefatory Note to Uniform Computer Information Transactions Act* (visited Jan. 21, 2000) <<http://www.law.upenn.edu/bll/hole/ucita/citam99.htm>> [hereinafter *Prefatory Note*]. The 1999 draft of UCITA is available in full online. See NCCUSL, *UCITA* (visited Mar. 19, 2000) <[http://www.law.upenn.edu/bll/hole/ucita/ucita\\_99.htm](http://www.law.upenn.edu/bll/hole/ucita/ucita_99.htm)> [hereinafter U.C.I.T.A.].

27. *Prefatory Note*, *supra* note 26.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

NCCUSL drafted the UCITA to govern transactions dealing with computer information and goods.<sup>32</sup> The Act defines "computer information" as "information in electronic form which is obtained from or through the use of a computer or which is in a form capable of being processed by a computer. The term includes a copy of the information and any documentation or packaging associated with the copy."<sup>33</sup> The Act defines "information" broadly as "data, text, images, sounds, mask works, or computer programs, including collections and compilations of them."<sup>34</sup>

The Act only governs transactions that include an agreement to create, modify, transfer, or license computer information.<sup>35</sup> If a contract involves both computer information and another product, the UCITA "applies only to the part of the deal that involves computer information."<sup>36</sup> For instance, if an individual buys a computer, the sale of the computer falls under Article 2 of the UCC because a computer is a good; however, the software embedded in the computer would be governed by the UCITA.<sup>37</sup>

Although NCCUSL wrote the UCITA as a contract statute, property issues also come into play. As stated, computer software consists of both a tangible and intangible good. A consumer buys a software package to use the information contained within the software. Information is subject to intellectual property law. The creator or publisher of information is entitled to a copyright of its work. Copyright violations fall under the provision of federal law. The Copyright Act and other federal statutes govern conflicts between creators and users.<sup>38</sup>

The UCITA pays heed to federal intellectual property law. Section 105(a) states that a provision of the Act preempted by federal law is unenforceable to the extent of the preemption.<sup>39</sup> This section may be applied to the federal Copyright Act.<sup>40</sup> Therefore, if a provision of the UCITA happens to interfere with a requirement of federal intellectual property law, the federal law would govern.

In addition to raising questions of intellectual property, information transactions also present concerns due to the importance of licensing in such transactions. One of the themes of the UCITA states that the paradigm

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32. See U.C.I.T.A., *supra* note 26, § 103(b)(1).

33. *Id.* § 102(10).

34. *Id.* § 102(35).

35. See Ring & Nimmer, *supra* note 6.

36. *Id.*

37. See *id.*

38. See, e.g., 17 U.S.C. §§ 101-1332 (1994).

39. See U.C.I.T.A., *supra* note 26, § 105(a).

40. See 17 U.S.C. §§ 101-1332.

transaction is a license of computer information, not a sale.<sup>41</sup> The UCITA characterizes a license by “the conditional nature of the rights or privileges conveyed to use the information and the focus on computer information, rather than on goods.”<sup>42</sup> Subject to public policy constraints, courts enforce most license restrictions. These restrictions may (a) limit the right of access, (b) prevent distribution of copies for a fee, or (c) preclude modification of computer information.<sup>43</sup>

The UCITA recognizes the prominence of licenses in computer information transactions. An entire part of the Act is devoted to Transfer of Interests and Rights.<sup>44</sup> This part is necessary because licenses often contain restrictions on transfer. The sections within this part help clarify the rights of each party. The Act also contains provisions on the duration of a license, permitting the parties to decide the length of the license.<sup>45</sup>

The licensing model presents different terminology than a sale of goods. Under the UCITA, a “seller” is referred to as a “licensor,” while a “buyer” is labeled a “licensee.” The UCITA labels the parties as licensor or licensee. The Act refers to the agreement between parties as a license.

B. *“Freedom of Contract”: Similarities Between the UCITA and the UCC*

The underlying principle of the UCITA is “freedom of contract.”<sup>46</sup> According to the Prefatory Note, “the idea of contractual freedom generates a preference in contract law for rules that provide background and play only a default or gap-filling function.”<sup>47</sup> Much of the positive commentary about the UCITA praises this devotion to freedom of contract.<sup>48</sup> The Prefatory Note states that the Act “adheres to the norm of [U.S.] commercial law; freedom of contract is the philosophy of commerce.”<sup>49</sup> The drafters followed that philosophy.

While drafting the UCITA, NCCUSL decided to pay heed to traditional contract law and took note of special requirements of the information industry. The drafters realized that many of the current

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41. See Prefatory Note, *supra* note 26.

42. *Id.*

43. See *id.*

44. See U.C.I.T.A., *supra* note 26, Part 5 Transfer of Interests and Rights.

45. See Ring & Nimmer, *supra* note 6.

46. *Id.*

47. Prefatory Note, *supra* note 26.

48. See, e.g., Donald A. Cohn & Mary Jo Dively, *The Need for a More Objective Look at the Myths of the Proposed Uniform Computer Information Transactions Act* (visited Nov. 2, 1999) <<http://www.2bguide.com/docs/myths.html>>.

49. Prefatory Note, *supra* note 26.

provisions of the UCC would apply to govern information transactions. As a result, several sections of the UCITA mirror rules from the UCC. These provisions include the following: the obligations of good faith and fair dealing; the manner of offer and acceptance, warranties, and remedies; and the common law ban on unconscionable contracts.

The UCC states that "[e]very contract or duty within this Act imposes an obligation of good faith in its performance or enforcement."<sup>50</sup> The UCITA matches this requirement, as it contains the exact same wording.<sup>51</sup> The UCITA and the UCC define "good faith" as "honesty in fact and the observance of reasonable commercial standards of fair dealing."<sup>52</sup> This provision protects all parties to a contract. Good faith requirements bind parties to be honest and observe reasonable commercial standards. If one party believes that the other party has failed to meet the good faith duty, then a court must determine if the offending party failed either of the mandates of the good faith test.

Both the UCITA and the UCC Article 2 broadly define contract formation and offer and acceptance. Each statute states that contracts may be formed in "any manner sufficient to show agreement."<sup>53</sup> This definition grants wide discretion to the contracting parties. The statutes permit similar discretion when defining the two vital elements of contract formation: offer and acceptance. Both state that "[a]n offer to make a contract invites acceptance in any manner and by any medium reasonable under the circumstances."<sup>54</sup> These sections grant contracting parties ample leeway to fashion agreements favorable to their individual business situations.

In spite of the similarities, NCCUSL recognized that computer information contracts do not work exactly the same as sale of goods contracts. In response, the organization inserted provisions specific to information transactions. The UCITA contains a section entirely devoted to transactions involving electronic agents. The Act defines "electronic agent" as "a computer program, or electronic or other automated means, used by a person to initiate an action, or to respond to electronic messages or performances, on the person's behalf without review or action by an individual at the time of the action, or response to the message or performance."<sup>55</sup>

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50. U.C.C. § 1-203 (1995).

51. See U.C.I.T.A., *supra* note 26, § 114(b).

52. *Id.* § 102(32); U.C.C. § 1-201(19) (1995).

53. U.C.I.T.A., *supra* note 26, § 202(a); U.C.C. § 2-204(1) (1995).

54. U.C.I.T.A., *supra* note 26, § 203(1); U.C.C. § 2-206(1)(a) (1995).

55. U.C.I.T.A., *supra* note 26, § 102 (27).



Because an electronic agent may act on behalf of its principal without the principal's knowledge, the UCITA's drafters realized the potential for abuse. In an attempt to guard against such abuse, section 206 of the UCITA addresses offer and acceptance by electronic agents. The section permits the formation of a contract by electronic agents. However, the section also permits courts to grant relief "if the operations resulted from fraud, electronic mistake, or the like."<sup>56</sup>

Section 206 represents the UCITA in a microcosm. The section notes that the special qualities of the information industry require new modes of contracting. Hence, electronic agents may be used to create contracts. However, the section also recognizes potential problems with this form of contracting. To prevent these problems, the section places limits on contracts formed by electronic agents. The Act continually pays heed to the themes of (a) recognize and implement unique qualities of the information industry but (b) place limits on those qualities in the interest of fairness.

A principle component of UCC Article 2 is the protection it offers buyers through warranties. Article 2 contains both express and implied warranties. Express warranties apply if the seller has promised the buyer something and the bargain is based on that promise.<sup>57</sup> Implied warranties apply to the seller regardless of any statements made by the seller. Goods must be "merchantable," meaning that they must "pass without objection in the trade," be of "fair average quality," and be "fit for the ordinary purposes for which such goods are used."<sup>58</sup> These warranties are subject to exclusion or modification, but a seller must conspicuously note the change.<sup>59</sup>

The UCITA also provides a number of warranties to protect licensees of information. Section 402 covers express warranties. Under section 402, a licensor is deemed to have created a warranty by making a promise to the licensee which relates to the information and becomes a basis for the bargain.<sup>60</sup> The UCITA also places several implied warranties on the licensor. The licensor warrants, *inter alia*, that the computer program is fit for the ordinary purpose for which the program is designed;<sup>61</sup> "that the program conforms to any promises or affirmations of fact made on the container or label;"<sup>62</sup> "that there is no inaccuracy in the informational

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56. *Id.* § 206(a).

57. *See* U.C.C. § 2-313(1) (1995).

58. *Id.* § 2-314 (1)-(2) (1995).

59. *See id.* § 2-316(2) (1995).

60. *See* U.C.I.T.A., *supra* note 26, § 402(a)(1).

61. *See id.* § 403(a)(1).

62. *Id.* § 403(a)(2)(B)(3).

content caused by the merchant's failure to perform with reasonable care;<sup>63</sup> and that if the licensor at the time of contracting has knowledge of a particular purpose for which the licensee plans to use the information, then "the information is fit for that purpose."<sup>64</sup> In order to disclaim or modify any implied warranty, the licensor must abide by strict guidelines, all of which require that the disclaimer be "conspicuous."<sup>65</sup>

The presence of warranties in the UCITA represents NCCUSL's concern with leveling the playing field between bargaining parties. Critics of the UCITA fear that large software manufacturers may take advantage of smaller licensees by disclaiming warranties without the licensees' knowledge or approval.<sup>66</sup> However, the Act prevents this outcome by requiring that disclaimers be conspicuous.<sup>67</sup>

As one learns early in his legal education, remedies play an important role in contract law. Because contracts are private agreements between parties, actions for damages arise when one party breaches. Governments enforce these agreements and order damages because our society could not function without private deals. Consequently, both the UCC and the UCITA contain remedy provisions. The UCITA's remedies serve to protect both licensors and licensees in the event of breach. Licensors may recover damages measured in a multitude of ways, including: (1) "the amount of accrued and unpaid contract fees;"<sup>68</sup> (2) the amount of loss suffered if the licensor enters a substitute transaction;<sup>69</sup> and (3) the amount of lost profit that the licensor would have realized on completion of the contract.<sup>70</sup> The UCITA protects licensees with a number of remedy provisions. Damages may be calculated in any combination of the following ways: (a) "the value of the performance required less the value of the performance accepted;"<sup>71</sup> (b) "the amount of payments made and the value of other consideration given to the licensor;"<sup>72</sup> (c) "the market value of the performance less the

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63. *Id.* § 404(a).

64. *Id.* § 405(a)(1).

65. *Id.* § 406(b)(1)(A).

66. See, e.g., Cem Kaner, *Why Writers Should Actively Oppose the Uniform Computer Information Transactions Act (UCITA)* (visited Jan. 20, 2000) <<http://www.nwu.org/pic/ucita2.htm>>.

67. See U.C.I.T.A., *supra* note 26, § 406(b)(1).

68. *Id.* § 808(b)(1)(A).

69. See *id.* § 808(b)(1)(B)(i).

70. See *id.* § 808(b)(1)(C).

71. *Id.* § 809(a)(1)(A).

72. *Id.* § 809(a)(1)(B)(i).

contract fee for that performance;<sup>73</sup> and (d) “the cost of a commercially reasonable substitute transaction less the contract fee.”<sup>74</sup>

Both the UCITA and the UCC prevent “unconscionable” terms in contracts. The UCITA states that if a court finds a contract term unconscionable, “the court may refuse to enforce the contract, enforce the remainder of the contract without the unconscionable term, or limit the application of the unconscionable term so as to avoid an unconscionable result.”<sup>75</sup> Unconscionability is a common law contract condition that has been incorporated into modern commercial law. The term does not have a standard meaning. Courts and commentators offer a variety of definitions, but unconscionability is generally explained as “an absence of meaningful choice on the part of one of the parties together with contract terms[,] which are unreasonably favorable to the other party.”<sup>76</sup> In the transactional setting of the UCITA, unconscionability stands as the final guardian of justice. If all other arguments fail, a party can argue that the court should not enforce the contract because the contract contains unconscionable elements.

### C. *The UCITA's Innovations*

NCCUSL has paid heed to the UCC by placing several provisions based on the UCC into the UCITA. However, the organization realized that the UCITA could not merely echo the UCC. The complexity of computer information requires a law that acknowledges the specific characteristics of the information industry. The UCITA's drafters recognized these characteristics and included them in the statute. These characteristics include: new forms of licensing, new warranty protections, restricted self-help, and a modernized perfect-tender rule.

The UCITA recognizes the unique quality of software usage and develops specific rules about licensing. The UCITA has created the concept of a “mass market license (MML).” MML is a “standard form contract used for transactions with the general public in a retail setting where the information is generic and the customer can be anyone.”<sup>77</sup> Under an MML, the license and the software are the same for every customer.<sup>78</sup> MMLs deal with intellectual property rights and access to information. The license

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73. *Id.* § 809(a)(1)(B)(ii).

74. *Id.* § 809(a)(1)(B)(iii).

75. *Id.* § 111(a); see U.C.C. § 2-302(1) (1995).

76. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965).

77. *Ring & Nimmer*, *supra* note 6.

78. *See id.*

conveys rights to the licensee and allows publishers to create and market a variety of products, which characterize the information industry.<sup>79</sup>

The MML is a revolutionary concept.<sup>80</sup> According to two NCCUSL members, the concept "recognizes that the retail market is a context unto itself and one in which both consumers and businesses (especially small businesses) routinely participate as purchasers."<sup>81</sup> Although the MML is a standard form contract, a consumer is not bound by the contract unless he has consented to the contract after an opportunity to review.<sup>82</sup> Even if a consumer agrees to the contract, the terms of the license are limited to the following rules: (1) unconscionable terms are unenforceable; and (2) terms that conflict with the actual agreement of the parties are unenforceable.<sup>83</sup>

Another licensing rule deals with "shrinkwrap" licenses. Shrinkwrap refers to a contract that the consumer does not see until after she initially agrees to acquire a product and then receives it.<sup>84</sup> This type of contract is prevalent when one purchases an item over the phone or by mail. When the consumer receives the product and opens the package (removes the shrinkwrap), a contract is contained in the package or on the start-up screen for the software.<sup>85</sup> Today, courts commonly enforce shrinkwraps, and shrinkwraps have become a standard means of business in the information industry.<sup>86</sup> Thus, the UCITA codifies the enforceability of shrinkwrap licenses. However, the statute places restrictions on the enforceability of such licenses.<sup>87</sup>

The UCITA states that shrinkwrap licenses are *unenforceable* unless: (1) the licensee "had reason to know that more terms would be coming;" (2) the licensee is "given a right to return the product if [she does not] like the terms;" (3) the "right of return is cost-free [sic];" and (4) the licensee is reimbursed any reasonable costs of its system, if the system is altered when she tried to read the license terms.<sup>88</sup>

As stated above, warranties play a key role in striking a balance between seller and buyer in both the UCC and the UCITA. The UCITA expands upon the express and implied warranties and mandates several

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79. *See id.*

80. *See id.*

81. *Id.*

82. *See id.*

83. *See* U.C.I.T.A., *supra* note 26, § 209(a)(1)-(2).

84. *See* Ring & Nimmer, *supra* note 6.

85. *See id.*

86. *See id.*

87. *See id.*

88. *Id.*; *see* U.C.I.T.A., *supra* note 26, § 209(b).

new warranties upon the licensors.<sup>89</sup> The new warranties include an implied warranty of quiet enjoyment,<sup>90</sup> an implied warranty of system integration,<sup>91</sup> and an implied warranty of data accuracy.<sup>92</sup> These warranties are all innovations in the UCITA. They represent NCCUSL's acknowledgment that computer information transactions require laws that reflect the intricacies of the industry.

Section 401(b)(1) states that:

A licensor warrants:

(1) for the duration of the license, that no person holds a rightful claim to, or interest in, the information which arose from an act or omission of the licensor, other than a claim by way of infringement or misappropriation, which will interfere with the licensee's enjoyment of its interest.<sup>93</sup>

This section allows a licensee to use the licensor's information without a threat that another party will interfere with its use of the information. This freedom is important due to the nature of computer information. As stated, information is subject to intellectual property law. If a licensor does not have property rights to its information, then the licensee may lose its right of use. This warranty protects licensees from such outcomes.

The UCITA also requires licensors to competently understand their customers' needs. Section 405(c) states that if an agreement requires a licensor to provide or select a system, and the licensor has knowledge that the licensee relies on the licensor's skill or judgment to select the system, then the licensor warrants that the components provided will function as a system.<sup>94</sup> This implied warranty protects a neophyte user who depends on the skill of a software provider to operate his system.

Licensors are also responsible for the informational content. Section 404(a) states that a merchant "warrants to the licensee that there is no inaccuracy in the informational content caused by the merchant's failure to perform with reasonable care."<sup>95</sup> This section forces a licensor to take all reasonable steps to assure its customers that the information is accurate. Licensees need this protection. They depend on the licensor to provide them with accurate information. This warranty legally binds the licensor to license error-free information.

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89. See Ring & Nimmer, *supra* note 6.

90. See U.C.I.T.A., *supra* note 26, § 401(b)(1).

91. See *id.* § 405(c).

92. See *id.* § 404(a).

93. *Id.* § 401(b)(1).

94. See *id.* § 405(c).

95. *Id.* § 404(a).

The UCTA grants licensors self-help remedies, just as the UCC grants secured parties a right to take possession of their collateral.<sup>96</sup> However, self-help remedies for information transactions call for different actions. While collateral involved in an Article 9 secured transaction usually consists of a tangible good that may be repossessed, a software program cannot be "repossessed" in the same manner. Consequently, licensors have developed a means to turn off the software in cases of dispute.<sup>97</sup> This disabling mechanism grants licensors extensive powers over the licensees. However, the UCTA places several restrictions on a licensor's use of such a powerful device.

Section 816 thoroughly covers the issue of self-help. First, a licensee must "separately manifest" assent to the licensor's use of electronic self-help.<sup>98</sup> The term must be conspicuously noted and cannot be hidden in a contract. Second, before resorting to electronic self-help, the licensor must provide fifteen days notice "in a record to the person designated by the licensee."<sup>99</sup> Third, the notice must state the nature of the breach.<sup>100</sup> Finally, self-help is not available as a remedy if "the licensor has reason to know that its use will result in substantial injury or harm to the public health or safety or grave harm to the public interest substantially affecting third persons not involved in the dispute."<sup>101</sup> The above protections prevent arbitrary and capricious use of self-help by licensors. These restrictions also protect software users and the public.

At common law, a party could refuse a performance by another party if the adverse party committed a material breach of the contract.<sup>102</sup> If one of the parties substantially performed its requirements under the contract, then the contract could not be canceled. Article 2 of the UCC includes a different standard to refuse a performance. Under that Article, a buyer may refuse a product if the product fails in any respect to conform to the contract.<sup>103</sup> This rule is known as the "perfect tender" rule. It allows a buyer

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96. See U.C.C. § 9-503 (1995) (stating that "a secured party has on default the right to take possession of the collateral"). A secured party is allowed to take possession without judicial process, if the possession may be taken without breaching the peace. Other than the requirement to keep the peace, the UCC places no other restrictions on secured parties. See *id.*

97. See Brennan & Barber, *supra* note 25.

98. U.C.I.T.A., *supra* note 26, § 816(c).

99. *Id.* § 816(d)(1).

100. See *id.* § 816(d)(2).

101. *Id.* § 816(f).

102. See RESTATEMENT (SECOND) OF CONTRACTS § 237 (1981).

103. See U.C.C. § 2-601 (1995).

to cancel a contract if the other party fails to fulfill all the terms, no matter how minute the discrepancy.

The UCITA rejects the UCC's perfect tender rule and adopts the common law standard. The UCITA does not consider a contract breached unless one of the parties commits a material breach. The Act says a breach is material if the "breach caused or is likely to cause substantial harm to the aggrieved party; or the breach substantially deprived or is likely to substantially deprive the aggrieved party of a significant benefit it reasonably expected under the contract."<sup>104</sup> In short, the UCITA adopts the "substantial performance" standard. This standard, essential for software products, prevents one party from terminating a contract for minor problems. As two UCITA drafters state, "the idea of perfect software is a goal or aspiration not presently attainable, at least not without exorbitant costs that would drive many thousands of small companies out of the business."<sup>105</sup> Because software is so complicated and involves millions of pieces of information, the likelihood of a perfect product is astronomical.<sup>106</sup> The substantial performance standard protects software producers, allowing the user to cancel the contract only if a material breach occurred.

### III. THE UCITA COMMENTARY

Critics have lined up in favor and against the UCITA. Despite the Act's overwhelming approval by NCCUSL in July 1999, a number of individuals and organizations have lobbied the states to withhold approval of the Act. This Part examines the positive and negative commentary surrounding the UCITA.

#### A. *Support for the UCITA*

A variety of commentators support the UCITA. The Act's drafters, software industry representatives, and academics have published articles to encourage enactment of the UCITA. While supporters of the Act cite a number of different reasons for the states to pass the Act, four alleged benefits of the Act are paramount: standardization, uniformity, innovation, and modernization.<sup>107</sup>

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104. U.C.I.T.A., *supra* note 26, § 701(b)(3)(A)-(B) (1999).

105. Ring & Nimmer, *supra* note 6.

106. *See id.*

107. *See* Brennan & Barber, *supra* note 25.

### 1. Industry Insiders

Lorin Brennan and Glenn Barber have published an article in support of the UCITA.<sup>108</sup> Brennan is an attorney specializing in international copyright licensing, while Barber is a software developer and educator.<sup>109</sup> They focus on the four benefits listed above to compel the states to pass the UCITA. They argue that standardization of the law is essential because the "legal standards for information contracting are in disarray."<sup>110</sup> They claim that e-commerce sites leave many critical terms "up in the air."<sup>111</sup> For example, current law fails to address what is the duration of a license, what warranties apply, and what remedies apply for breach.<sup>112</sup> They believe that the UCITA will answer these questions.<sup>113</sup>

Brennan and Barber also believe that the UCITA brings about the uniformity that the industry demands.<sup>114</sup> They assert that e-commerce is "national and even global."<sup>115</sup> This fact creates a problem if "software transactions are still subject to the varying common law of the [fifty] states."<sup>116</sup> As an example, they note that a dozen states have enacted digital signature laws.<sup>117</sup> However, the UCITA solves this dilemma by granting both suppliers and customers a single set of uniform rules.<sup>118</sup>

To demonstrate the innovation benefit of the UCITA, Brennan and Barber cite software programs as specific examples. They refer to Java and Linux programs to prove the importance of granting software developers' freedom while creating their products.<sup>119</sup> Both of these programs provide benefits to their users. These benefits, however, come at a cost. A licensee of these programs agrees that the licensor waives implied warranties and consequential damages.<sup>120</sup>

To Brennan and Barber, Java and Linux offer a key trade-off: valuable software on an "as is" basis.<sup>121</sup> They state that "innovation requires trade-offs between time, cost[,] and quality. The UCITA opts in favor of

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108. *See id.*

109. *See id.*

110. *Id.*

111. *Id.*

112. *See id.*

113. *See id.*

114. *See id.*

115. *Id.*

116. *Id.*

117. *See id.*

118. *See id.*

119. *See id.*

120. *See id.*

121. *Id.*



innovation, letting developers and their customers decide for themselves what those trade-offs should be."<sup>122</sup>

Brennan and Barber also note the UCITA's recognition that technology creates new ways to contract.<sup>123</sup> They list a number of examples where the Act permits new contractual mechanisms. These include click-on contracts, mass market licenses, electronic agents, and electronic self-help.<sup>124</sup> They point out that all of these modernizations reflect the drafters concern for customer rights.<sup>125</sup>

Although their piece focuses on the strengths of the UCITA, Brennan and Barber also hypothesize on the fate of the industry without the Act. They believe that without the UCITA, the industry will witness increased costs, reduced competition, decreased innovation, and restrictive rules.<sup>126</sup>

Micalyn Harris is another software industry executive who calls for approval of the UCITA. She bases her analysis of the UCITA on one question: "will those who provide computer software and other computer information and those who use it, and the public at large, be better served by having [the] UCITA in place than being without it?"<sup>127</sup> She answers that we are all better off with the UCITA in place. She focuses her conclusion on: (1) the Act's acceptance of the licensing model as means of contracting; (2) the uniformity that the Act will bring; and (3) the Act's positive effects on competition.<sup>128</sup>

Harris states that software and information transactions have primarily used licensing arrangements to grant rights to use the information.<sup>129</sup> Because of the growth of licensing as a means of contracting, a "separate set of provisions based on the licensing model . . . would be better suited to the continuing, rapid expansion of the affected industries, their suppliers and their customers and clients."<sup>130</sup> She applauds the UCITA for "accept[ing] the basic proposition that the licensing model deserves recognition in our statutory law."<sup>131</sup>

Echoing the sentiments of Brennan and Barber, Harris believes that the UCITA "will provide some uniform rules and standards regarding contract formation in this area and establish balanced default rules

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122. *Id.*

123. *See id.*

124. *See id.*

125. *See id.*

126. *See id.*

127. Harris, *supra* note 1.

128. *See id.*

129. *See id.*

130. *Id.*

131. *Id.*

regarding a variety of issues, e.g., choice of law and remedies."<sup>132</sup> She believes the benefits from this uniformity will include "increased certainty in contracting" and a decrease in litigation.<sup>133</sup>

Harris also believes that the UCITA encourages competition. She argues that "mandating broader rights and undisclaimable warranties will result in higher prices, less variety, . . . and less competition in the computer information industry."<sup>134</sup> She states that NCCUSL correctly decided to have the UCITA remain neutral and not mandate broader rights and undisclaimable warranties.<sup>135</sup> She claims that the "cost of broader rights and warranties is greater than the benefits for which users are willing to pay."<sup>136</sup>

Finally, Harris states that "no piece of legislation is perfect."<sup>137</sup> She asserts that the goal of good legislation should not be perfection, but rather striking a balance between competing views.<sup>138</sup> In her opinion, the UCITA strikes such a balance. She expects that the Act will reduce litigation by providing uniform guidelines and support the growth of the information industry.<sup>139</sup>

## 2. The UCITA's Drafters

As expected, members of NCCUSL have published articles to support passage of the UCITA. Raymond Nimmer, Reporter for the Drafting Committee of the Act, has written an article to answer questions that many critics present.<sup>140</sup> He has also written an article to correct what he considers "myths" about the UCITA.<sup>141</sup>

In a paper written with Carlyle Ring, Chair of the Drafting Committee, Nimmer provides a thorough analysis of the UCITA, examining sixteen facets of the Act and the information industry, including "consumer issues," "warranties," and "duration of license."<sup>142</sup> The authors focus on the need for the UCITA, asserting that information technology is

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132. *Id.*

133. *Id.*

134. *Id.*

135. *See id.*

136. *Id.*

137. *Id.*

138. *See id.*

139. *See id.*

140. *See* Ring & Nimmer, *supra* note 6.

141. *See* Raymond Nimmer, *Correcting Some Myths About UCITA* (visited Jan. 19, 2000) <<http://www.2bguide.com/docs/rne.html>>.

142. Ring & Nimmer, *supra* note 6.

the “most rapidly expanding component of our economy.”<sup>143</sup> They state that the UCITA will allow states to provide a “neutral and predictable legal framework for transactions in computer information.”<sup>144</sup>

The article serves as an educational tool. Ring and Nimmer thoroughly analyze all of the Act’s controversial sections, including those covering warranties, mass market licenses, and self-help repossession. The authors anticipate many negative questions about the Act and attempt to refute those questions. They organize the article in a question and answer format. Critics of the UCITA pose the hypothetical questions. The answers serve as assurance that the Act will benefit both the software industry and consumers.<sup>145</sup>

For example, the article asks the question “Does [the] UCITA reduce the warranties that are given to licensees?”<sup>146</sup> The authors answer “no” and then list a number of warranties that the Act provides, such as the implied warranties of enjoyment, merchantability, and system integration.<sup>147</sup> This format repeats throughout the paper, as Ring and Nimmer hope to assuage the fears of the UCITA’s critics.

In a second article, Nimmer corrects what he considers to be four myths about the UCITA. These myths focus on consumer groups’ fears that the Act benefits the software industry to the detriment of consumers.<sup>148</sup> These myths concern: (1) the ability of a licensor to disable software; (2) the UCITA choice of forum clause; (3) the capability of a licensor to change the terms of a shrinkwrap license; and (4) the power of a licensor to prevent licensees from commenting about the products.<sup>149</sup>

Nimmer challenges critics’ comments that the UCITA will permit licensors to disable software in the event of a breach. He answers these critics by mentioning that “significant new protections for the licensee . . . will, in effect, largely preclude use of this remedy.”<sup>150</sup> He stresses the Act’s requirements of licensee consent and fifteen-day notice before disabling.<sup>151</sup> He claims that the UCITA offers greater licensee protection than current law.<sup>152</sup>

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143. *Id.*

144. *Id.*

145. *See id.*

146. *Id.*

147. *See id.*

148. *See Nimmer, supra* note 141.

149. *See id.*

150. *Id.*

151. *See id.*

152. *See id.*

Nimmer defends the UCITA's choice of forum clause. He argues that the Act protects licensees from being forced to sue at the licensor's choice of forum.<sup>153</sup> He notes that the UCITA invalidates choice of forum clauses if they are "unreasonable and unjust."<sup>154</sup> As further protection, Nimmer refers to a licensee's ability to use the UCITA's prohibition against unconscionable contract terms to prevent unreasonable choice of forum terms.<sup>155</sup>

Another myth that Nimmer wishes to correct involves a belief that shrinkwrap licenses can change a license after the sale.<sup>156</sup> He refutes this concern, noting that "the terms of a mass market license cannot alter the express agreement of the parties."<sup>157</sup> Finally, Nimmer responds to the claim that the UCITA allows licensors to prevent licensees from commenting about the products.<sup>158</sup> He notes that no such provision may be found in the Act.<sup>159</sup> He claims that the UCITA's opponents fear this scenario because there is nothing in the Act that specifically bans the practice.<sup>160</sup> But, as he explains, the absence of a provision does not mean that the action is authorized.<sup>161</sup>

### 3. Academics

Members of the academy have also written in support of the UCITA. David Friedman, a law professor at Santa Clara University, published a piece in favor of private ordering of the market for intellectual property.<sup>162</sup> He notes that the UCITA (actually UCC 2B at the time he wrote) represents a change in the manner in which creators of intellectual property control their works. He explains that the shift is "from dependence on the public law of copyright to dependence on contract and self-enforcement—from a public to a private ordering."<sup>163</sup> He believes that this change is for the better.<sup>164</sup>

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153. *See id.*

154. *Id.*

155. *See id.*

156. *See id.*

157. *Id.*

158. *See id.*

159. *See id.*

160. *See id.*

161. *See id.*

162. *See* David Friedman, *In Defense of Private Orderings: Comments on Julie Cohen's "Copyright and the Jurisprudence of Self-help"*, 13 BERKELEY TECH. L.J. 1151 (1998).

163. *Id.* at 1164.

164. *See id.*

Friedman claims that a private ordering of the intellectual property market will lead to more intellectual property and greater use of existing intellectual property.<sup>165</sup> He argues that “[c]urrent developments in this direction ought to be encouraged, not discouraged, by the law.”<sup>166</sup>

The UCITA’s supporters speak from a range of perspectives. However, a common tie binds them; the UCITA provides standardization and uniformity to a rapidly expanding industry. They believe that the continued growth of the information industry depends on passage of the Act.

### *B. Opposition to the UCITA*

Opposition to the UCITA comes from a variety of sources. A number of critics have written pieces pleading for major changes to the Act. Others push for the Act to be scrapped. Much of the criticism began before NCCUSL changed the name to the UCITA. Because the change from Article 2B to the UCITA provided only a semantic change in the Act’s title, the criticisms rendered on Article 2B apply equally to the UCITA. Critics of the Act may be placed into one of four groups: government agencies, consumer groups, industries, and academics. Although each of these groups present different reasons to oppose the Act, a common theme ties them together: the belief that the UCITA favors software providers over users.<sup>167</sup>

#### *1. Government Agencies*

The Federal Trade Commission (FTC) has written to NCCUSL to explain its concerns with the UCITA.<sup>168</sup> The FTC complains that the Act will allow a licensor to “limit or control how the licensee uses the software”.<sup>169</sup> In addition, the FTC notes that the “UCITA departs from an important principle of consumer protection that material terms must be disclosed prior to the consummation of the transaction.”<sup>170</sup>

The FTC also worries that the UCITA could restrain trade by upsetting the “delicate balance” between intellectual property and competition policy.<sup>171</sup> The Commission posits that contracts approved

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165. See *id.* at 1151.

166. *Id.*

167. See Toft, *supra* note 9.

168. See FTC Letter, *supra* note 15.

169. *Id.*

170. *Id.*

171. *Id.*

under the UCITA could violate antitrust laws, misuse intellectual property, and violate trade secret statutes.<sup>172</sup>

Complementing the concerns from the FTC, several state attorneys general have voiced opposition to the UCITA in a letter to NCCUSL.<sup>173</sup> Attorneys general from fourteen states have signed the letter. They claim that the UCITA favors "a relatively small amount of vendors to the detriment of millions of businesses and consumers who purchase computer software and subscribe to Internet services."<sup>174</sup> The attorneys general focus their opposition to the UCITA on consumer protection concerns, which they believe are hindered by the Act.

The attorneys general particularly take offense to Section 105(d) of the UCITA.<sup>175</sup> Section 105(d) preempts existing state law requirements that terms be in writing or conspicuous. Under this section, if a term meets the requirements of the Act, the requirement is satisfied regardless of what state law requires.<sup>176</sup> The attorneys general are concerned that the standards in section 105(d) are "inconsistent with the fundamental principles underlying the laws [they] preempt."<sup>177</sup> Another concern relating to section 105 involves the Act's definition of "conspicuous."<sup>178</sup> The UCITA defines conspicuous as a term "so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it."<sup>179</sup> The attorneys general worry that this definition "ignores most of the basic principles of communication and is unlikely to result in disclosures actually being communicated."<sup>180</sup>

The attorneys general also criticize the UCITA regarding contract formation. They fear that the Act will permit a licensor to withhold contract terms until after a sale has occurred.<sup>181</sup> They believe the UCITA should require that "prior to the formation of any enforceable contract from which terms have been withheld, notice should be given to the purchaser that additional terms will be provided in the future."<sup>182</sup>

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172. *See id.*

173. *See* Attorney General Letter, *supra* note 14.

174. *Id.*

175. *See id.*

176. *See* U.C.I.T.A., *supra* note 26, § 105(d).

177. Attorney General Letter, *supra* note 14.

178. *Id.*

179. U.C.I.T.A., *supra* note 26, § 102(14) (1999).

180. Attorney General Letter, *supra* note 14.

181. *See id.*

182. *Id.*

## 2. Consumer Groups

Another group that opposes the UCITA is the Working Group on Consumer Protection of the ABA's Business Law Section (Group). The Group sent a letter to NCCUSL to voice its concerns about the Act.<sup>183</sup> The Group worries that the "UCITA's primary purpose is to shift the balance of power in mass market software transactions and strengthen the ability of vendors to dictate terms in adhesive form contracts."<sup>184</sup> It believes that the Act will reduce competition among software vendors and provide less incentive to increase quality.<sup>185</sup> The Group argues that the UCITA fails to adequately protect consumers. It posits that consumers are "much better off under current law."<sup>186</sup> It criticizes several of the new consumer protections inserted into the UCITA, including the right of return and protection against electronic error.<sup>187</sup>

The Group also denounces the technical quality of the Act. It claims that the quality of the UCITA is "so poor that it would create uncertainty and resulting cost."<sup>188</sup> It notes that a number of terms defined in the Act are confusing and do not correspond with traditionally understood meanings of the terms. The Group believes these terms will hurt the industry, citing a need for "pretransaction availability" of terms for the market to operate competitively.<sup>189</sup>

## 3. Industry Groups

An alliance of library association executives (Library Group) also has written to NCCUSL to express opposition to the UCITA.<sup>190</sup> They believe that the Act presents challenges to libraries. They assert that the UCITA presents an "overly simplistic view of the marketplace for information."<sup>191</sup> The Library Group criticizes the Act's definition of parties as either a licensor or a licensee. Libraries do not fit into the binary system because they play intermediary roles.<sup>192</sup>

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183. See Letter from Jean Braucher & Mark Budnitz, Coauthors of the Working Group on Consumer Protection, ABA Business Law Section, to Gene Lebrun, President, NCCUSL (June 10, 1999), available at (visited Jan. 21, 2000) <<http://www.2Bguide.com/docs/jmb6699.html>>.

184. *Id.*

185. *See id.*

186. *Id.*

187. *See id.*

188. *Id.*

189. *See id.*

190. See Library Letter, *supra* note 11.

191. *Id.*

192. *See id.*

The Library Group states that a library must be able to purchase materials and contract for information on behalf of its users. However, the UCITA complicates the tasks of librarians and increases the expense. The Library Group fears that passage of the Act would require more time to educate library staff, negotiate licenses, and track materials.<sup>193</sup> They note that the "approach and terms of the UCITA challenge the very core of these fundamental activities of libraries."<sup>194</sup>

A number of industry groups have also voiced opposition to the UCITA. These organizations include the Motion Picture Association of America, the Recording Industry Association of America, and the National Writers Union (NWU).<sup>195</sup> The NWU has launched a vigorous campaign to fight the adoption of the UCITA.<sup>196</sup> It urges its members to combat the UCITA because it harms them as authors and as software users.<sup>197</sup>

The NWU lists two reasons why the UCITA is objectionable to writers. First, it reduces and confuses authors' rights when they sign contracts as writers. Second, it reduces members' rights as software customers.<sup>198</sup> The NWU worries that if an author writes a book that is published both online and in hard copy, different laws will govern the book. The hard copy would be governed by existing contract law, while the online version would fall under the UCITA. It complains that this adds confusion and makes contract negotiations much more complicated.<sup>199</sup>

#### 4. Academics

In addition to industry and government opposition, several academics have criticized the UCITA. About four dozen intellectual property professors drafted a letter to NCCUSL to complain about the Act.<sup>200</sup> They complain that the Act failed to take "sufficient account of the principles of intellectual property law."<sup>201</sup> The professors cite a few specific concerns about the Act. First, they believe the scope of the project is "fatally flawed because it does not take into account the realities of intellectual property

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193. *See id.*

194. *Id.*

195. *See* National Writers Union, *Partial List of Organizations that Oppose UCC 2B and UCITA* (visited Jan. 20, 2000) <<http://www.nwu.org/pic/tccorgs.htm>>.

196. *See* National Writers Union, *supra* note 12.

197. *See* Kaner, *supra* note 66.

198. *See id.*

199. *See id.*

200. *See* Professor Letter, *supra* note 13. The professors drafted this letter in November 1998 and complain about UCC 2B. At that point, NCCUSL had not yet changed UCC 2B's name to UCITA; however, the concerns of the professors remain relevant to UCITA.

201. *Id.*



transactions in the modern world.”<sup>202</sup> Second, they fear that the Act will confuse the “already uncertain relationship between intellectual property rules and state contract law,”<sup>203</sup> arguing that the Act gives “familiar terms new meanings or implications that are at odds with the settled expectations of courts and lawyers.” To the professors, asking courts to learn new sets of meanings for familiar intellectual property terms is unreasonable.<sup>204</sup>

Jean Braucher is a professor of law at the University of Arizona and a harsh critic of the UCITA. She has published, among others, an article entitled *Why UCITA, Like UCC Article 2B, Is Premature and Unsound*.<sup>205</sup> She lists a number of concerns with the Act and asked NCCUSL to table it for now. She states that no codification for the next five years would be preferable.<sup>206</sup>

Braucher believes that the UCITA would increase uncertainty and the resulting costs.<sup>207</sup> To her, the UCITA fails in its efforts to clarify statutory text. For example, it leaves “a host of unanswered questions about what constitutes a ‘computer information transaction’ and about what entertainment and publishing media fit that description.”<sup>208</sup> She also worries that the warranty provisions may not be enforced. She notes that the statute “makes it very easy for software publishers to disclaim all liability for the quality of their products and to provide no meaningful remedy.”<sup>209</sup>

Maureen O’Rourke, a law professor at Boston University, also expressed concern about the UCITA.<sup>210</sup> She initially analyzed the UCC and its great success.<sup>211</sup> But, she believes that computer information transactions are different from sale of goods because of the licensing and intellectual property issues involved in information transactions. Because of these discrepancies, O’Rourke states that the “one size fits all” approach of Article 2 cannot work in the information setting.<sup>212</sup> She states that the UCITA is at odds with the UCC’s goals of simplicity and clarification.<sup>213</sup>

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202. *Id.*

203. *Id.*

204. *See id.*

205. Jean Braucher, *Why UCITA, Like UCC Article 2B, Is Premature and Unsound* (visited Jan. 20, 2000) <<http://www.2bguide.com/docs/0499jb.html>>.

206. *See id.*

207. *See id.*

208. *Id.*

209. *Id.*

210. *See* Maureen O’Rourke, *Progressing Towards a Uniform Commercial Code for Electronic Commerce or Racing Towards Nonuniformity?*, 14 BERKELEY TECH. L.J. 635 (1999).

211. *See id.* at 647.

212. *Id.* at 648.

213. *See id.*

O'Rourke also takes issue with the UCITA's provisions that call for contracts to be determined according to trade usage. She believes that the computer information industry is too new and evolving to warrant deference to particular norms.<sup>214</sup> She believes that the statute should make the first move towards establishing norms of desirable practices.<sup>215</sup> In this way, the Code could lead the way for the industry's development, instead of following the moves of the industry leaders.

While opponents of the UCITA present different objections, their concerns may be summed up in two points. First, the UCITA favors software manufacturers to the detriment of customers. Second, uniformity and codification of the computer information industry is premature at this time. As a result, the opponents do not favor approval of the Act by the states.

#### IV. CONCLUSION: WHY STATES SHOULD RATIFY THE UCITA

The States should recognize the many positive features of the UCITA and follow Virginia's lead by ratifying the Act. The information industry calls for the standardization and uniformity that the UCITA offers. Although the Act is not without its faults, the overall impact should benefit all parties in the computer information industry. An industry that affects the American economy so greatly can no longer wander without uniform rules.

As stated, the UCITA follows the UCC principle of "freedom of contract." This philosophy reflects NCCUSL's recognition that the parties, not the government, should govern commerce. American commercial law uniformly removes the regulatory hand of the government. For instance, Articles 2 and 9 of the UCC grant the contracting parties great freedom to control their sales of goods and secured transactions, respectively. Computer information is a new form of commerce. In order for the information industry to achieve success, its actors need to be granted the same autonomy that parties to sales of goods and secured transactions are granted.

The Prefatory Note explains that in addition to freedom of contract, commercial law also emphasizes the importance of codification to encourage commercial practice.<sup>216</sup> Codification leads to "a congruence between legal premise and commercial practice so that transactions between contracting parties achieve commercially intended results."<sup>217</sup> Once codification has taken place, parties are able to confidently engage in

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214. See *id.* at 651.

215. See *id.*

216. See *Prefatory Note*, *supra* note 26.

217. *Id.*

transactions without fear that their definition of terms will not mesh with the law's definition. Once this fear has been alleviated, commerce can flourish.

The UCITA confronts the diverse field of computer information and provides the codification that the fledgling industry requires. The Act provides a thorough definition section, defining several terms specific to the computer information industry. These include: computer information, electronic agent, and mass market license.

There is little debate that the UCITA benefits the software industry. Since very little opposition to the Act has come from the industry, one can infer that the manufacturers and distributors of computer information support the Act. However, the benefits granted to the industry do not come at the expense of consumers. The UCITA contains a wealth of provisions designed to protect the consumers and provide for a level playing field.

First, the UCITA offers many warranty protections to licensees. As stated, the Act places a number of implied warranty responsibilities on the licensors. These warranties assure that software customers will get the product they pay for and that the product will conform to their wishes. Should a licensor fail to meet the warranties, it will be liable to the licensee for damages.

Second, the Act limits the licensor's ability to use disabling devices. These technological developments grant awesome powers to the licensors, as they can prevent the licensee's continued use of the software. However, the UCITA places several restrictions on the licensor's use of self-help. A licensor cannot use the remedy unless the licensee separately assents;<sup>218</sup> the licensor must give notice;<sup>219</sup> and the public health and safety cannot be threatened by software shutdown.<sup>220</sup>

Third, the UCITA contains common law and statutory consumer protections. The most prevalent of these protections involve good faith and unconscionability. The Act mandates that the parties act in good faith. Good faith requires honesty and observance of reasonable commercial standards.<sup>221</sup> Courts will not enforce contracts that stray too far from commercial standards. This restriction protects consumers from unscrupulous software vendors. The UCITA's refusal to enforce unconscionable contracts grants consumers further protection.<sup>222</sup> This common law standard shields licensees from contract terms that the court

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218. See U.C.I.T.A., *supra* note 26, § 816(c).

219. See *id.* § 816(d)(1).

220. See *id.* § 816(f).

221. See *id.* § 102(14).

222. See *id.* § 111.

finds particularly offensive. This section stands as a final guardian to protect neophyte consumers.

The consumer protections assure that freedom of contract cannot be unlimited. If the Act did not contain those protections, then it would not be a piece of legislation worthy of support. A new statute should attempt to strike a balance between the interests of the involved parties. The UCITA strikes that balance. The software industry benefits from the Act's uniformity and support of innovation. Software users benefit in two ways. First, passage of the Act will encourage greater competition from manufacturers. Consumers benefit from this competition by receiving better products at cheaper prices. Second, the UCITA's consumer protections prevent software users from living at the mercy of the manufacturers.

The states should pass the UCITA and bring uniformity to the computer information industry. Our economy becomes more dependent on information transactions each day. We cannot afford to leave the industry with the current hodge podge of legal questions. Article 2 of the UCC cannot provide the answers because of its focus on tangible goods. The common law cannot meet the challenge because each state governs independently. A uniform act that keeps contract law under the states' control presents the optimal solution.